PP

v.

LOW KIAN BOON & ANOR

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
HASAN LAH JCA
JEFFREY TAN J
[CRIMINAL APPEAL NOS: B-05-72-2006;
B-05-73-2006 & B-05-74-2006]
8 APRIL 2009

CRIMINAL LAW: *Penal Code - Sections 302, 34 - Murder - Common intention - Conviction of lesser offence under s. 304 Penal Code - Totality of evidence - Whether ingredients of offence under s. 302 established - Misdirection by trial judge*

CRIMINAL PROCEDURE: *Conviction - Conviction on lesser charge - Murder - Common intention - Totality of evidence - Whether ingredients of offence under s. 302 established - Misdirection by trial judge - Penal Code, ss. 34, 302, 304*

CRIMINAL PROCEDURE: *Appeal - Conviction, against - Murder - Common intention - Conviction of lesser offence under s. 304 Penal Code - Totality of evidence - Whether ingredients of offence under s. 302 established - Misdirection by trial judge - Penal Code, ss. 34, 302, 304*

Hans Herzog ('the deceased'), at the time of his death, was married to one Ulan Joe Yok ('PW20'); PW20 had two daughters from her previous marriage, SK and SY. On 11 November 2003 at about midnight, after the deceased and PW20 had retired for the night, PW20 heard a knock on the bedroom door. She opened the door but found no one there. PW20 then went to SY's room and as she opened the door, someone came at her. In fear she returned to her bedroom and told the deceased, who then went to SY's room himself. A little later, PW20 heard the deceased cry out in pain. He returned to his bedroom and PW20 noticed that his face had been slashed. Covering his wound with a T-shirt and ignoring PW20's pleas, the deceased went downstairs in search of his assailant. At about that time PW20 saw another figure, a male, proceed after the deceased. The deceased was subsequently found

A dead at the bottom of the staircase leading to the ground floor of the house, with 23 slash wounds on his body including one at the base of his neck. A parang ('exh. 22'), said to be the murder weapon, was recovered from SY's room. Following police investigations, four persons were arrested and charged under
B s. 302 of the Penal Code ('Code') read with s. 34 of the Code for murdering the deceased. Of the four, SK and SY, the 2nd and 3rd child respectively, were acquitted at the close of the prosecution's case. The 1st accused and the 4th child were directed to enter their defences, and both of them gave evidence
C on oath. At the conclusion of the whole case, the trial judge found both guilty of an offence under s. 304 of the Code and sentenced each of them to ten years' imprisonment from the date of their arrest. The public prosecutor, dissatisfied with the conviction on the lesser charge, appealed to this court. The 1st
D accused and the 4th child also appealed to set aside their convictions on the ground that they were not guilty of any offence whatsoever.

Held (allowing the public prosecutor's appeal; dismissing the
E **appeals of the 1st accused and the 4th child)**
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) Applying the established principles to the instant case, the
F following conclusions may be safely arrived at. Firstly, it was the 1st accused and the 4th child, or either or both of them, who must have inflicted the fatal injuries on the deceased. Secondly, applying the third limb of s. 300 of the Code they must be taken to have intended to cause the injuries found
G on the deceased. Thirdly, they must have intended thereby to cause the death of the deceased. Fourthly, the attack on the deceased was pre-planned. This was supported by the purchase of two parangs, including exh. P22, by the 1st accused and the 4th child and the stealthy manner in which
H the 1st accused and the 4th child entered the deceased's house. It was equally supported by the fact that one of them – either the 1st accused or the 4th child – pursued the deceased down the staircase of the deceased's home. Thus, taking into account the element of premeditation, the nature
I of the weapon used, the nature of the injuries inflicted on the deceased which indicated a savage attack and all the other

surrounding circumstances, the irresistible conclusion that a reasonable tribunal properly directing itself upon the law and the totality of the evidence would arrive at was that both accused intended to kill the deceased. *Virsa Singh v. State* (foll); *Jai Prakash v. State (Dehli Administration)* (foll); *Jagrup Singh v. The State of Haryana* (foll). (para 11)

(2) On the facts and circumstances, this court was satisfied, as was indeed the trial judge, that the 1st accused and the 4th child committed the offence of murder with common intention. Their joint presence at the scene and their participation inferred from the injuries inflicted on the deceased coupled with their flight from the scene reasonably supported the existence of a common intention. Although there were authorities which state that mere flight or absconding from the scene of the crime is insufficient to infer guilty intention, in all those case flight was the only circumstance relied upon. That was not so in the present case. There were other facts and circumstances which must be taken together with the flight of both accused from the scene of the crime. *Tan Hung Thiam & Anor v. PP* (refd); *Anjaiah and others v. State of Andhra Pradesh* (refd). (para 13)

(3) The prosecution had at the close of the whole case before the High Court established all the ingredients of an offence under s. 302 of the Code. The judge therefore misdirected himself on the facts and the evidence and upon the law in holding that the lesser offence under s. 304 of the Code had been committed. (para 15)

[Conviction of 1st accused and 4th child under s. 304 of the Code set aside and substituted with one under s. 302. The 4th child to be detained at a place of lawful imprisonment at the pleasure of His Royal Highness the Sultan of Selangor. The 1st accused was sentenced to death.]

Bahasa Malaysia Translation

Hans Herzog ('si mati'), pada masa kematiannya, berkahwin kepada seorang Ulan Joe Yok ('PW20'); PW20 mempunyai dua anak perempuan dari perkahwinan sebelumnya, iaitu SK dan SY. Pada 11 November 2003 pada pukul lebih kurang dua belas tengah malam, selepas si mati dan PW20 telah masuk tidur, PW20 dengar satu ketukan pada pintu bilik tidur. Beliau buka pintu

A tetapi tiada sesiapa di sana. PW20 kemudiannya pergi ke bilik SY dan ketika beliau buka pintu, seorang menerkam ke arahnya. Dalam keadaan bertakutan beliau kembali ke bilik tidurnya dan memberitahu si mati, yang selepas itu sendiri pergi ke bilik SY. Sekejap kemudian, PW20 dengar si mati menjerit kesakitan. Beliau
B kembali ke bilik tidurnya dan PW20 nampak bahawa mukanya telah dikelar. Menutup lukanya dengan sehelai baju kemeja dan tidak menghiraukan rayuan-rayuan PW20, si mati turun ke bawah mencari penyerangnya. Pada masa yang lebih kurang sama PW20 nampak satu bentuk lagi, seorang lelaki, mengikut si mati. Si mati
C kemudiannya dijumpai mati di bawah tangga rumah yang membawa kepada tingkat bawah rumah, dengan 23 luka kelaran pada badannya termasuk satu luka di bawah lehernya. Sebilah parang ('eks. 22'), yang dikatakan merupakan senjata pembunuhan, telah dijumpai dalam bilik SY. Berterusan dari penyiasataan polis, empat
D orang telah ditahan dan dituduh di bawah s. 302 Kanun Keseksaan ('Kanun') dibaca bersama-sama dengan s. 34 Kanun kerana membunuh si mati. Dari empat orang itu, SK dan SY, anak kedua dan ketiga masing-masing, telah dibebaskan pada penghujung kes pendakwaan. Tertuduh pertama dan anak keempat
E telah diarahkan memasuki pembelaan mereka, dan mereka dua memberi keterangan selepas mengangkat sumpah. Pada kesudahan seluruh kes, hakim perbicaraan mendapati mereka berdua bersalah melakukan kesalahan di bawah s. 304 Kanun dan menghukum setiap seorang kepada 10 tahun dalam penjara dari tarikh
F penangkapan mereka. Pendakwa raya, tidak berpuas hati dengan sabitan atas tuduhan yang lebih ringan itu, telah merayu kepada mahkamah ini. Tertuduh pertama dan anak keempat juga merayu untuk mengenepikan sabitan-sabitan mereka atas alasan bahawa mereka tidak bersalah melakukan apa-apa kesalahan pun.

G

Diputuskan (membenarkan rayuan pendakwa raya; menolak rayuan-rayuan tertuduh pertama dan anak keempat)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

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(1) Menggunakan prinsip-prinsip yang mantap kepada kes semasa, kesimpulan-kesimpulan berikut boleh dibuat dengan selamat. Pertamanya, ia adalah tertuduh pertama dan anak keempat, ataupun salah satu atau mereka dua, yang semestinya telah
I menyebabkan kecederaan-kecederaan fatal atas si mati. Keduanya, menggunakan anggota ketiga s. 300 Kanun mereka

mesti dikatakan telah berniat untuk menyebabkan kecederaan-kecederaan yang dijumpai pada si mati. Ketiganya, mereka mesti berniat dengan itu untuk mengakibatkan kematian si mati. Keempatnya, serangan atas si mati telah dirancang terdahulu. Ini telah disokong oleh pembelian dua bilah parang, termasuk eks. P22, oleh tertuduh pertama dan anak keempat dan cara mencuri-curi tertuduh pertama dan anak keempat telah memasuki rumah si mati. Ia juga disokong sama-sama oleh fakta bahawa salah seorang dari mereka – sama ada tertuduh pertama atau anak keempat – mengejar si mati bawah tangga rumah si mati. Oleh yang demikian, mengambil kira elemen dirancang terlebih dahulu, sifat senjata pembunuhan yang digunakan, sifat kecederaan-kecederaan yang diakibatkan atas si mati yang menunjukkan satu serangan ganas dan semua halkeadaan sekeliling yang lain, kesimpulan yang tidak dapat dibendung bahawa sesuatu tribunal munasabah yang mengarahkan dirinya atas undang-undang dan keseluruhan keterangan akan mendapati ialah bahawa kedua-dua tertuduh berniat untuk membunuh si mati. *Virsa Singh v. State* (diikuti); *Jai Prakash v. State (Dehli Administration)* (diikuti); *Jagrup Singh v. The State of Haryana* (diikuti).

(2) Atas fakta-fakta dan halkeadaan, mahkamah ini berpuas hati, seperti juga hakim perbicaraan, bahawa tertuduh pertama dan anak keempat telah melakukan kesalahan membunuh dengan niat bersama. Kehadiran bersama-sama mereka di tempat kejadian dan penglibatan mereka yang mana inferens dibuat daripada kecederaan-kecederaan yang disebabkan atas si mati berganding dengan pelarian mereka dari tempat kejadian menyokong secara munasabah kewujudan suatu niat bersama. Walaupun terdapat autoriti-autoriti yang menyatakan bahawa pelarian sahaja atau melarikan diri dari tempat kejadian jenayah tidak mencukupi untuk buat inferens niat bersalah, dalam kesemua kes-kes itu pelarian merupakan halkeadaan tunggal yang diharapkan. Itu bukan keadaannya dalam kes semasa. Terdapat lain fakta-fakta dan halkeadaan yang mesti diambil bersama-sama dengan pelarian dari tempat kejadian jenayah. *Tan Hung Thiam & Anor v. PP* (dirujuk); *Anjaiah and others v. State of Andhra Pradesh* (dirujuk).

(3) Pendakwaan telah pada penghujung seluruh kes di hadapan Mahkamah Tinggi membuktikan semua unsur-unsur kesalahan di bawah s. 302 Kanun. Hakim, oleh itu, telah menyalaharahkan dirinya atas fakta-fakta dan keterangan dan atas undang-undang dengan memutuskan bahawa kesalahan yang lebih ringan di bawah s. 304 Kanun telah dilakukan.

[Sabitan tertuduh pertama dan anak keempat di bawah s. 304 Kanun diketepikan dan digantikan dengan satu sabitan di bawah s. 302. Anak keempat untuk ditahan pada sebuah tempat pemenjaraan yang sah atas keinginan Duli Yang Maha Mulia Sultan Selangor. Tertuduh pertama dikenakan hukuman mati.]

Case(s) referred to:
Anjaiah and Others v. State of Andhra Pradesh 2008 (1) ALD (Cri) 844 ***(refd)***
Jagrup Singh v. The State of Haryana AIR [1981] SC 1552 ***(foll)***
Jai Prakash v. State (Delhi Administration) [1991] AIR SCW 654 ***(foll)***
Tan Hung Thiam & Anor v. PP [1991] 1 LNS 63 ***(refd)***
Virsa Singh v. State AIR [1958] SC 465 ***(foll)***

Legislation referred to:
Child Act 2001, s. 97(2)
Evidence Act 1950, s. 21
Penal Code, ss. 34, 300, 302, 304

For the appellant - Ahmad Bache; A-G's Chambers
For the 1st respondent - Edmund Bon; M/s David Kok & Partners
For the 2nd respondent - Karpal Singh (Sangeet Kaur Deo with him); M/s Karpal Singh & Co

[Appeal from High Court, Shah Alam; Criminal Trial No: 45-3-2004]

[Editor's note: For the High Court judgment, please see PP v. Low Kian Boon & Ors [2006] 3 CLJ 649.]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

[1] This is the judgment of the court.

[2] Hans Herzog died in tragic circumstances. He was done unto death. At the time, he was married to Ulan Joe Yok (PW20). She had been previously married. She had two daughters by that marriage, SK and SY. This is how Herzog came to meet his end.

[3] On 11 November 2003 at about midnight, after they had retired for the night, PW20 heard a knock on the bedroom door. She opened the door but found no one there. PW20 then went to SY's room. As she opened the door someone came at her. In fear she returned to her bedroom and told her husband about it. Herzog, whom we will hereafter refer to as the deceased, then went to SY's room himself. A little later, PW20 heard the deceased cry out in pain. The deceased then returned to his bedroom. PW20 noticed that his face had been slashed. Covering his wound with a T-shirt and ignoring PW20 pleas, the deceased went downstairs in search of his assailant. At about that time PW20 saw another figure, a male, proceed after the deceased. Later, the body of the deceased was found at the bottom of the staircase leading to the ground floor of the house. He was quite dead. There were 23 slash wounds on his body including one at the base of his neck. That the deceased succumbed to these injuries is beyond doubt. A parang (exh. P22) was recovered from SY's room. It is said to be the murder weapon. Following police investigations, four persons were arrested and produced before the court. They were all charged under s. 302 of Penal Code read with s. 34 of that Code for murdering the deceased. Of the four, SK and SY were the 2nd and 3rd child respectively. Both were acquitted at the close of prosecution's case. There is no appeal against that order and we therefore find it unnecessary to say anything further about this part of the case. The 1st accused and the 4th child were directed to enter upon their defence. Both gave evidence on oath. At the conclusion of the whole case, the learned trial judge found both guilty of an offence under s. 304 of the Penal Code and sentenced each of them to ten years imprisonment from the date of their arrest. The public prosecutor being dissatisfied with the conviction on the lesser charge has now appealed to us. The 1st accused and 4th child have also appealed to us to set aside the conviction under s. 304 on the ground that they are guilty of no offence whatsoever. We heard arguments on all three appeals yesterday and adjourned them to this morning to pronounce our decision and give our reasons for it.

[4] The evidence upon which the public prosecutor relies in support of his appeal is as follows. First, the nature of the injuries suffered by the deceased. These are such as to point to an intention to kill on the part of those who inflicted them. Second,

A the other evidence which the public prosecutor says irresistibly points to the 1st accused and the 4th child as being the assailants who inflicted the wounds on the deceased. In the first place, there is evidence that the 1st accused and the 4th child purchased two parangs from PW5 and PW6. One of the parangs
B is exh. P22. In the second place, there is the evidence of PW17 and PW18. In a gist, this is what the two witnesses said. At a little past midnight, PW18 received a telephone call on his mobile from the 4th child asking to be picked up from a Shell petrol station at USJ. PW17 and PW18 went along. On arrival, the 1st
C accused and the 4th child emerged from the petrol station and entered the car. PW19 was driving it. Both PW17 and PW18 noticed that the clothing of the 1st accused and the 4th child was blood stained. Also, the 4th child appeared to be in a state of shock. While in the car, the 4th child informed PW17 and PW18
D that he and the 1st accused had hit someone's father. All those in the car then proceeded to PW17's home where the 4th child had a shower and changed his clothes. PW17 then asked him what had happened. In response, the 4th child said that he and the 1st accused had killed someone but with no intention to cause
E death. These statements, submits the learned deputy who argued the appeal before us are admissible as admissions under s. 21 of the Evidence Act 1950. In the third place, there is the blood stained clothing later recovered by the police during investigation which carried the blood of the deceased as established by DNA
F testing. A similar test was conducted on the blood stain found on exh. P22 which established that that weapon carried the deceased's blood. In the fourth place, there is evidence showing that the police party who arrived at the scene of the crime had used a tracker dog which had led them from the deceased's house
G to the very Shell station where PW17 and PW18 had picked up the 1st accused and the 4th child. Lastly, there is evidence to show that the 1st accused was seen in the compound of the deceased's house at about the time the crime was committed.

H **[5]** The case for the 1st accused is that he never committed the crime. He was at the deceased's house to help SK and SY escaped from the clutches of their stepfather. Both the 1st accused and the 4th child put the blame for the crime on someone called Ivan. The learned judge after a thorough discussion
I of the facts and evidence made the following finding:

> Based on the testimony of SP20, it is clear that there were only 2 persons inside the room of SY. In view of my finding that the 1st accused and 4th child (described in this judgment as the 4th accused) were inside the house of the deceased, and in the absence of evidence of any other intruders, I find that it was the 1st accused and 4th child who were inside SY's room. Based on SP20's evidence, it is clear that one of them had attempted to attack her when she opened the door of SY's room. It is also my finding, that upon deceased going to investigate who the intruders were, he was attacked inside the room (of SY) by one of them with a parang.

We accept that finding as entirely correct based on the proved facts before the learned judge. It follows that the defence of innocent presence failed.

[6] However, the learned judge then went on to say something about which the public prosecutor now made complaint. And this is what the learned judge said:

> However, I am unable to determine, on the evidence, whether it was the 1st accused or the 4th child who attacked him. Nevertheless, it is obvious that at that stage there was no intention at all to kill the deceased, otherwise they would have pursuit him to his bedroom, after the attack on him in SY's room. Again, based on SP20's testimony it is safe to infer, that because the deceased had not return to SY's room, but, instead, had run downstairs, he must have been aware that the 1st accused and 4th child were attempting to flee from the house, after the initial attack on him in SY's room, without intending to cause him any further injury. Nevertheless, it would appear that the deceased was determined, either to apprehend them or put up a fight with them, in the belief, in all probability, that his superior physical build (117 kg) in contrast to the puny size of the 1st accused and 4th child would enable him to overpower them. Unfortunately, this must have triggered a further attack on the deceased downstairs, either by the 1st accused or 4th child, when he attempted to overpower them on their way out of the house. In all probability, the fatal injury must have been inflicted, unintentionally in this 'fight' downstairs.

[7] It is the submission of the learned deputy who appeared before us that the finding encapsulated in the above quoted paragraph is pure speculation on the part of the learned judge. It was submitted that this is a case in which the learned judge was attributing a defence to the accused which had not been

advanced by either of them or warranted by the evidence that had been placed before the court. After very careful and anxious consideration, we have arrived at the conclusion that there is merit in this argument. First, there is not an *iota* of evidence to suggest that the deceased had pursued his attackers in the manner described by the learned judge. On the other hand, there is evidence to show that one of the attackers had gone after the deceased. That is indeed what PW20 said. Second, there are the injuries suffered by the deceased. Third, there is the weapon exh. P22 that was used to inflict the injuries in question.

[8] In answer to these points, learned counsel for both the 1st accused as well as the 4th child have argued that there is material within the prosecution's case which negates an intention to kill. They relied principally on the statement made by the 4th child to PW17. In that statement the 4th child had said that there was no intention to kill. It is submitted that since this forms part of the prosecution's case, the defence is entitled to rely on it to show that one of the vital ingredients of the offence of murder had not been made out. With respect, we do not agree. What PW17 was narrating was the 4th child's version given to him. The prosecution however led cogent evidence to show that the suggestion that there was no intention to kill was untrue. Next, it was submitted for the 1st accused and the 4th child that the learned trial judge was entitled to make a finding that both accused were attempting to flee the deceased's house by means of the staircase. However, as pointed out by the learned deputy who has argued this appeal, if the accused really wished to make an escape they could have done so through SY's room. For, there is evidence to show that SY herself had left the house by exiting through her room.

[9] Now it is settled law that whether there is intention to kill in a given case is a question that should be approached along broad based, simple and common sense lines. See *Virsa Singh v. State* AIR [1958] SC 465. In *Jai Prakash v. State (Delhi Administration)* [1991] AIR SCW 654, the Supreme Court of India made the following observation with which we find ourselves in agreement:

As noted already, when a person commits an act, he is presumed to expect the natural consequences. But the mere fact that the injury caused is sufficient in the ordinary course of nature to cause death it does not necessarily follow that the offender intended to cause the injury of that nature. However, the presumption arises that he intended to cause that particular injury. In such a situation the Court has ascertain whether the facts and circumstances in the case are such as to rebut the presumption and such facts and circumstances cannot be laid down in an abstract rule and they will vary from case to case. However, as pointed out in *Virsa Singh*'s case AIR [1958] SC 465, the weapon used, the degree of force released in wielding it, the antecedent relations of the parties, the manner in which the attack was made that is to say sudden or premeditated, whether the injury was inflicted during a struggle or grappling, the number injuries inflicted and their nature and the part of their body where the injury was inflicted are some of the relevant factors. These and other factors which may arise in and case have to be considered and if on a totality of these circumstances a doubt arises as to the nature of the offence, the benefit has to go to the accused. In some cases, an explanation may be there by the accused like exercise of right of private defence or the circumstances also may indicate the same. Likewise there may be circumstances in some cases which attract the first exception. In such cases different considerations arise and the Court has to decide whether the accused is entitled to the benefit of the exception, though the prosecution established that one or the other clauses of section 300 I.P.C is attracted. In the present enquiry we need not advert to that aspect since we are concerned only with scope of Clause Thirdly of Section 300, I.P.C.

[10] In *Jagrup Singh v. The State of Haryana* AIR [1981] SC 1552, Sen J when delivering judgment said this:

these observations of Vivian Bose, J have become *locus classicus*. The test laid down in *Virsa Singh*'s case for the applicability of Clause Thirdly is now ingrained in our legal system and has become part of rule of law. Under Clause Thirdly of s. 300 of the Code, culpable homicide is murder if both the following conditions are satisfied: (a) that the act which causes death is done with the intention of causing a bodily injury; and (b) that the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. It must proved that there was an intention to inflict that particular bodily injury which in the ordinary course of nature, was sufficient to cause death, *viz*, that the injury found to be present was the injury that was intended to be inflicted.

[11] Applying the foregoing principles to the facts of this case, the following conclusions may be safely arrived at. Firstly, it was the 1st accused and the 4th child or either or both of them who must have inflicted the fatal injuries on the deceased. Secondly, applying the third limb of s. 300 of the Penal Code they must be taken to have intended to cause the injuries found on the deceased. Thirdly, they must have intended thereby to cause the death of the deceased. Fourthly, the attack on the deceased was pre-planned. This is supported by the purchase of the two parangs including exh. P22 and the stealthy manner in which the 1st accused and the 4th child entered the deceased's house. It is equally supported by the fact that one of them – either the 1st accused or the fourth child – pursued the deceased down the staircase of the deceased's home. Thus, taking into account the element of premeditation, the nature of the weapon used, the nature of the injuries inflicted on the deceased which indicate a savage attack and all the other surrounding circumstances to which reference has already been made, the irresistible conclusion that a reasonable tribunal properly directing itself upon the law and the totality of the evidence would arrive at is that both accused intended to kill the deceased.

[12] That brings us to the application of s. 34 of the Penal Code upon which argument was addressed to us. There is surfeit of authority on the way of which s. 34 is to be applied and we find it sufficient to refer to two authorities on that subject. In *Tan Hung Thiam & Anor v. Public Prosecutor* [1991] 1 LNS 63, Chua J when delivering the judgment of the Court of Criminal Appeal of Singapore said:

> On the question of common intention under s. 34 of the Penal Code, the trial judges relied on a long line of cases. It is clear from the decision of the Privy Council in *Barendra Kumar Ghosh v. Emperor* AIR [1925] PC 1 and *Mahboob Shah v. Emperor* AIR [1945] PC 118 and from the decision of the Court of Criminal Appeal of Singapore in *Mimi Wong & Anor v. PP* [1972] 2 MLJ 75 that, in a criminal prosecution where s. 34 is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. For s. 34 to apply it is sufficient if the prosecution prove that there was in existence a common intention between all the persons who committed the criminal act and that the act which constituted the offence charged was done in furtherance of that common intention.

[13] On the facts and circumstances of the present case, we are satisfied as indeed the learned trial judge was that the 1st and 4th accused committed the offence of murder with common intention. Their joint presence at the scene and their participation to be inferred from the injuries inflicted on the deceased coupled with their flight from the scene reasonably support the existence of a common intention. We are conscious that there are authorities which state that mere flight or absconding from the scene of the crime is insufficient to infer guilty intention. But if you look all those cases you will find that in each of them flight was the only circumstance relied upon. That is not so in the present case. There are other facts and circumstances which must be taken together with the flight of both accused from the scene of the crime.

[14] The other case we would refer to is a more recent one. It is *Anjaiah and Others v. State of Andhra Pradesh* 2008 (1) ALD (Cri) 844 where the court held as follows:

> Section 34 IPC lays down a principle of joint liability in doing a criminal act. The essence of liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. The distinct of s. 34 is element of participation in action. The common intention implies acting in concert, existence of prearranged plan which is to be proved either from conduct or from circumstances or from any incriminating facts. It requires a prearranged plan and it presupposes prior concert. Therefore, there must be prior meeting of minds. The prior concert or meeting of minds may be determined from the conduct of the offenders unfolding itself during the course of action and declaration made by them just before mounting the attack. It can also be developed at the spur of the moment but there must be pre-arranged or premeditated concert. Common intention is to be inferred from the circumstances particularly the part played by the accused and surrounding circumstances namely nature of the weapon used and injury inflicted as well as the meeting of the minds among the accused who are being held constructively liable. There is no uniform inflexible rule for applying the principle of common intention. The inference there for must be drawn from the totality of the facts and circumstances of each case *vide* the decision of the Supreme Court in *Rotash v. State of Rajasthan*, [2007] (1) ALD (Crl.) 217 (SC) = [2007] AIR SCW 44. Each case, however, has to be decided on its own merit. Facts of each case may have to be dealt with differently. Totality of circumstances could hardly be ever similar in all cases.

[15] Drawing the threads together, we would sum up in this way. The prosecution had at the close of the whole case before the High Court established all the ingredients of an offence under s. 302. The learned judge therefore misdirected himself on the facts and evidence and upon the law in holding that the lesser offence under s. 304 had been committed. For the reasons already given, we would therefore allow the appeal of the public prosecutor and set aside the conviction of the 1st accused and the 4th child under s. 304 of the Penal Code and substitute in it is place a conviction under s. 302.

[16] In relation to sentence, we must deal with the 4th child first. He was a child within the Child Act 2001 at the date of the commission of the offence. In accordance of s. 97 of the said Act, no sentence of death shall be passed against him. We would therefore, in his respect make an order under s. 97(2) of the same Act and direct that he be detained at a place of lawful imprisonment at the pleasure of His Royal Highness the Sultan of Selangor. The 1st accused is found guilty of murder and sentence of death is hereby passed upon him.

[17] The appeals of the 1st accused and the 4th child are hereby dismissed.